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104

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 82.

ANTONE MARKS, PLAINTIFF IN ERROR,

vs.

J. M. SHOUP.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

FILED JUNE 7th, 1900.

(17,442.)

(17,442.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 328.

ANTONE MARKS, PLAINTIFF IN ERROR,

vs.

J. M. SHOUP.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

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1-3 In the United States District Court for the District of Alaska.

ANTONE MARKS, Plaintiff,
vs.
J. M. SHOUP, United States Marshal for the District of Alaska, Defendant. } Complaint.

To the Honorable C. S. Johnson, judge of the United States district court for the district of Alaska:

Comes now the above-named plaintiff, by and through his attorneys, J. H. Cobb and W. E. Crews, and for cause of action against defendant complains and alleges as follows:

1st.

That the defendant now is and was at all of the times hereinafter mentioned duly appointed, qualified, and acting United States marshal in and for the district of Alaska.

2nd.

That on or about the 10th day of May, 1898, the plaintiff was the owner of and in the possession of a certain stock of merchant-tailoring goods, dry goods, boots and shoes, underwear, etc., in the town of Juneau, district of Alaska, and of the value of $3,500.00.

3rd.

That the defendant, J. M. Shoup, United States marshal for the district of Alaska, on or about the 10th day of May, 1898, in the district of Alaska, acting by and through his deputies, W. S.
4 Staley and C. Grant (both of whom are duly qualified and acting deputy United States marshals of the district of Alaska), without the consent of plaintiff and claiming to act under and by virtue of their official position, wrongfully, unlawfully, and forcably took from the possession of plaintiff all of said goods, wares, and merchandise aforesaid.

4th.

That before the commencement of this action and on or about the 13th day of May, 1898, plaintiff demanded of defendant the possession of said goods, wares, and merchandise, and the defendant refused and has ever since refused possession of said merchandise to plaintiff.

5th.

That the said defendant still wrongfully and unlawfully retains said possession of said goods, wares, and merchandise from possession of said plaintiff, to his damage in the sum of $3,500.00, the value thereof.

6th.

That plaintiff has been damaged in the sum of $2,500.00 for the wrongful and unlawful holding of said property from him.

Wherefore plaintiff prays judgment against defendant as follows:

1st.

For the recovery of the possession of said property, to wit, the said stock of tailoring goods, dry goods, boots and shoes, underwear, etc., or for the sum of $3,500.00, the value thereof, in case delivery cannot be had.

5–10 2nd.

For the sum of twenty-five hundred ($2,500.00) dollars damages for the wrongful and unlawful detention of said property.

J. H. COBB AND
W. E. CREWS,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA, }
District of Alaska, } ss:

I, Antone Marks, being first duly sworn, depose and say that I am the plaintiff in the above-entitled action, and that the foregoing complaint is true, as I verily believe.

ANTONE MARKS.

Subscribed and sworn to before me this 18th day of May, 1898.
[SEAL.] NORMAN E. MALCOLM,
U. S. Commissioner for Alaska.

UNITED STATES OF AMERICA, }
District of Alaska, } ss:

I, W. E. Crews, one of plaintiff's attorneys, do hereby certify that I have prepared the foregoing copy of complaint, and have carefully compared the same with the original thereof; that it is a correct transcript therefrom and of the whole thereof.

Dated the — day of ——, 189–.

—— ——.

UNITED STATES OF AMERICA, }
District of Alaska, } ss:

Due service of the within complaint is hereby accepted in the district of Alaska this 21st day of May, 1898, by receiving a copy thereof, duly certified to as such, by—

JAMES M. SHOUP.

W. E. CREWS,
Attorney for Plaintiff.

(Endorsed:) No. 662. In the district court of the United States for the district of Alaska. Antone Marks, plaintiff, *vs.* James M. Shoup, U. S. marshal, Alaska, defendant. Complaint. "Filed May

21, 1898. Albert D. Elliot, clerk." W. E. Crews, J. H. Cobb, att'ys for pl'ff.

11 On the 9th day of August, 1898, the defendant filed his answer herein, which is in words and figures as follows, to wit:

United States District Court, District of Alaska.

ANTONE MARKS, Plaintiff,
vs.
J. M. SHOUP, United States Marshal for the District of Alaska, Defendant. } Answer.

Comes now the defendant and for answer to the plaintiff's complaint herein alleges:

I.

The defendant admits each and every allegation set forth in the first count or paragraph of the plaintiff's complaint.

II.

The defendant denies each and every allegation set forth in the second count or paragraph of said complaint.

III.

The defendant denies each and every allegation set forth in the third count or paragraph of said complaint, except as hereinafter admitted and explained.

IV.

The defendant denies each and every allegation set forth in the fourth count or paragraph of said complaint.

V.

The defendant denies each and every allegation set forth in the fifth count or paragraph of said complaint.

12 VI.

The defendant denies each and every allegation set forth in the sixth count or paragraph of said complaint.

And for other and further answer to the said complaint, and by way of an affirmative answer and defense thereto, the defendant alleges:

1.

That on the 1st day of May, 1898, and for a long time prior thereto, one Joe Levy had been carrying on a general merchandise and clothing business at Juneau, Alaska, and in carrying forward such business bought large amounts of dry goods, ready-made

clothing, and that class of merchandise, together with other goods and wares from various wholesale and retail mercantile houses located in different points throughout the United States.

2.

That on the said first day of May, 1898, the said Joe Levy had on hand, as his stock in trade in the business set forth in the foregoing paragraph, certain goods, wares, and merchandise of the value of about three thousand ($3,000.00) dollars, which was the sole and only property owned by the said Levy in Alaska.

3.

That on said day the said Joe Levy was largely indebted to certain creditors in an amount exceeding by several thousand dollars the value of his stock on hand and his property, a portion of which said indebtedness is as follows:

	The Powers Dry-goods Company, St. Paul, Minn...	$290.25
13	The West Coast Grocery Company of Tacoma, Wn..	577.50
	The Willamette Tent and Awning Company of Portland, Oregon.....	1,024.60
	R. L. Sabine.....	2,287.85

And, as deponent is informed and verily believes, other indebtedness, exact amounts of which the defendant is unable to state.

4.

That on or about the 4th day of May, 1898, the said Joe Levy absconded from Juneau, Alaska, concealed himself on board the steamer "Alki," buying a ticket for his transportation thereon under a false and ficticious name, and subsequently sailed from Victoria, B. C., on board a British steamer bound for Japan.

5.

That a few days prior to his said absconding the said Joe Levy transferred or attempted to transfer the said stock of goods, clothing, and merchandise at Juneau to third parties, under which transfers the plaintiff herein pretends to claim title to the same.

6.

That the said conveyance, transfer, and assignment of the said goods, as aforesaid, was made with the intent to hinder, delay, and defraud the creditors of the said Joe Levy of their lawful suits, damages, debts, and demands, and is therefore void.

7.

14 That after the absconding of the said Joe Levy, as above set forth, and between the 4th day of May, 1898, and the 13th day of the same month, the said Powers Dry-goods Company and the said West Coast Grocery Company and the said Willamette Tent and Awning Company severally brought their actions at law in this court against the said Joe Levy to recover the several amounts

due them from him, as above set forth, and upon proper affidavit and undertaking in each case duly filed with the clerk of this court, caused to be issued out of this court against the said Joe Levy their several writs of attachment, which said writs were duly placed in the hands of the defendant herein, as United States marshal for the district of Alaska, for service, and that afterward, to wit, on or about the 16th day of May, 1898, under and by virtue of the said writs of attachment, the defendant, as such marshal, duly levied upon all of the goods, wares, and merchandise set forth in the plaintiff's complaint herein, and ever since that time has held and now holds the same as said United States marshal under and by virtue of said writs.

(8.)

That any attempted or pretended transfer or assignment of the said goods and chattels by the said Joe Levy to this plaintiff or any other persons, made either before or after the said levy, is in fraud of the creditors of the said Joe Levy, as above set forth, and that said goods were levied upon as aforesaid and are now held by this defendant, as such marshal, as the goods and property of the said Joe Levy, under and by virtue of the writs of attachment above mentioned.

Wherefore the defendant demands judgment dismissing this action upon the merits and for his costs and disbursements hereof.

ARTHUR K. DELANEY.
Attorney for Defendant.

UNITED STATES OF AMERICA, *District of Alaska*, } ss:

Arthur K. Delaney, being first duly sworn, on oath says "that he is the attorney for the defendant in the above-entitled action; that he has read the foregoing, knows the contents thereof, and believes the same to be true; that he makes this affidavit because all the material allegations of the said answer are within the personal knowledge of affiant."

ARTHUR K. DELANEY.

Subscribed and sworn to before me this 6th day of August, A. D. 1898.

[SEAL.]

J. T. JONES,
Notary Public for Alaska, Residing at Juneau.

Due service of a copy of within answer is admitted this 6th day of August, 1898.

J. H. COBB,
Attorney for Complainant.

(Endorsed:) No. 662. In the district court of the United States for the district of Alaska. Antone Marks, plaintiff, *vs.* James M. Shoup, as U. S. marshal, defendant. Answer. Original. Filed August 9th, 1898. Albert D. Elliot, clerk. Arthur K. Delaney, attorney for defendant, Juneau, Alaska.

16 And afterwards, on November 14th, 1898, the plaintiff filed his reply, which is in words and figures as follows, to wit:

In the United States District Court for the District of Alaska.

ANTONE MARKS, Plaintiff, *vs.* JAMES M. SHOUP, U. S. Marshal for the District of Alaska, Defendant.	No. —. Reply to New Matter.

Comes now the above-named plaintiff and for reply to the new matter set up in defendant's other and further answer to plaintiff's complaint alleges as follows:

I.

Answering paragraph one of the new matter set forth in defendant's other and further answer, plaintiff alleges that he has no knowledge or information sufficient to form a belief as to whether the allegations set forth therein are true or not, and therefore denies the same.

II.

Plaintiff denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs two, three, and four of said answer, and therefore denies the same.

III.

Answering paragraph five of said answer, plaintiff alleges that the said Joe Levy did, for good and valuable consideration, sell, assign, — transfer said stock of clothing and merchandise
17 to third parties, from whom this plaintiff purchased the same for a good and valuable con*di*seration.

IV.

Answering paragraph six of said answer, this plaintiff denies that said sale or any sale or transfer in relation to said goods was made with the intent and on behalf of this plaintiff to cheat or defraud the creditors of Joe Levy or any other person whomsoever.

V.

Answering paragraph seven of said complaint, this plaintiff alleges that he has no knowledge or information sufficient to form a belief as to the truth or not of the allegations set forth in said paragraph, and therefore denies the same and demands that defendant make proof thereof.

VI.

Answering paragraph eight of said answer, this plaintiff denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

For further and separate reply and by way of affirmative matter, the plaintiff alleges:

1. That during all of the times mentioned in the answer of defendant and prior to the commencement of said actions in said answer set forth and at all the times subsequent thereto, until said goods, wares, and merchandise were wrongfully and unlawfully taken from plaintiff's possession by the said defendant, this plaintiff was in the actual and exclusive possession of said wares and merchandise.

18-29 2. Plaintiff alleges that defendant never at any time, as alleged in his answer or otherwise, lawfully, regularly, or duly or otherwise levied or attached said goods, wares, and merchandise, as set forth in his said answer or otherwise or at all.

Wherefore plaintiff demands judgment as prayed for in his complaint.

J. H. COBB AND
W. E. CREWS,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA, *District of Alaska*, } ss:

I, Antone Marks, being duly sworn, say that I am the plaintiff in the above-entitled case; that I have read the foregoing reply, and it is true as I verily believe.

ANTONE MARKS.

Subscribed and sworn to before me this 11th day of November, 1898.

[SEAL.] C. S. BLACKETT,
Notary Public.

Service of the above and foregoing reply is admitted, at Juneau, Alaska, this 12th day of November, 1898.

ARTHUR K. DELANEY,
Attorney for Defendant.

(Endorsed:) No. 662. U. S. district court, Alaska. Antone Marks *vs.* James M. Shoup, U. S. marshal for the district of Alaska. Reply to new matter. Filed November 14th, 1898. Albert D. Elliot, clerk. W. E. Crews, attorney for plaintiff.

30 And afterwards, on December 3rd, 1898, the defendant filed his supplemental answer, which is in words and figures as follows, to wit:

United States District Court, District of Alaska.

ANTONE MARKS, Plaintiff,
vs.
JAMES M. SHOUP, as United States Marshal, Defendant. } Supplemental Answer.

Now, on this the 3rd day of December, 1898, after leave of court first granted in this behalf, comes the defendant and makes and

files this his supplemental answer herein, alleging facts material to the case occurring after the former answer.

1.

That in the case of The Powers Dry-goods Company *vs.* Joe Levy and the case of The West Coast Grocery Company against the same defendant judgments were duly rendered in this court in favor of the plaintiffs in each of said cases and against the said Joe Levy, on the 5th day of October, 1898, for the sum of two hundred and ninety dollars and twenty-five cents (290.25) damages and costs of suit, to be taxed in the case of the Powers Dry-goods Co., and for the sum of five hundred and seventy-seven dollars and fifty cents ($577.50) damages and costs of suit, to be taxed in the case of the West Coast Grocery Co., both of which said judgments have not been appealed from, vacated, or set aside, but still remain as final adjudications in said cases in this court.

2.

That on the 5th day of October aforesaid an execution
31 was duly issued out of this court and placed in the hands of the defendant herein, as United States marshal of this district, for the purpose of enforcing the collection of the said judgments, and that on the 7th day of October, 1898, the defendant herein, as such U. S. marshal, duly seized and levied upon the goods, wares, and merchandise set forth in plaintiff's complaint herein and theretofore held by him as such marshal under the writs of attachment mentioned and set forth in defendant's former answer.

3.

That under and by virtue of said levy under said execution this defendant, as such United States marshal, and by virtue of said execution and levy, after due and proper notice for that purpose, exposed for sale and sold at public vendue, to the highest bidder, the said goods, wares, and merchandise set forth in the complaint to satisfy the *the* said judgments of the said Powers Dry-goods Co. and the said West Coast Grocery Company, judgment creditors, against the said Joe Levy, judgment debtor, and as the property of the latter.

4.

That upon such sale he realized enough in cash to satisfy said judgments and costs, and thereupon, on the 24th day of Oct., 1898, duly returned the said executions into this court as fully discharged and satisfied, and deposited with the clerk of this court the amounts due on said judgments respectively and costs; which amounts have since been paid over by the clerk to the parties entitled to receive the same.

Wherefore the defendant demands judgment in accord-
32–34 ance with the prayer of his former answer.

ARTHUR K. DELANEY,
Defendant's Attorney.

UNITED STATES OF AMERICA, }
District of Alaska, } ss:

James M. Shoup, being first duly sworn, on oath says that he is the defendant in the above-entitled action; that he has read the foregoing supplemental answer, knows the contents thereof, and believes the same to be true.

JAMES M. SHOUP.

Subscribed and sworn to before me this 2 day of December, 1898.

ARTHUR K. DELANEY,
Notary Public, Alaska.

(Endorsed:) No. 662. In the district court of the United States for the district of Alaska. Antone Marks, plaintiff, *vs.* James M. Shoup, defendant. Supplemental answer. Arthur K. Delaney, attorney for defendant, Juneau, Alaska. Filed December 3rd, 1898. Albert D. Elliot, clerk. (Original.)

35 And afterwards, upon the same day, the jury having returned into court and all the parties being present, the jury returned the following verdict, which is in words and figures as follows, to wit:

ANTONE MARKS, Pl'ff,
vs.
JAMES M. SHOUP, Def't. } Verdict.

We, the jury, find for the defendant.

GEO. E. JAMES, *Foreman.*

Endorsed: No. 662. Antone Marks *vs.* James M. Shoup, United States marshal. Verdict. Filed December 3rd, 1898. Albert D. Elliot, clerk.

Whereupon the jury are discharged by the court from further attendance upon this cause.

Afterwards, on December 5th, 1898, the plaintiff filed his motion for a new trial, which is in words and figures as follows, to wit:

36 In the United States District Court in and for the District of Alaska.

ANTONE MARKS
vs.
J. M. SHOUP, U. S. Marshal. } Motion for New Trial.

Now comes the plaintiff, Antone Marks, by his attorneys, and moves the court to set aside the verdict of the jury rendered in this cause on the 3rd day of December, 1898, and grant him a new trial hereof, and for cause shows:

I.

There was error prejudicial to plaintiff's rights herein in admitting in evidence to the jury, over plaintiff's objections, the writs of

attachments and returns thereon in the case of The West Coast Grocery Company *vs.* Joe Levy and the case of The Powers Dry-goods Company *vs.* Joe Levy, because:

1st. It appeared from the records in said causes that said writs were unauthorized and void for the reasons that the affidavits for said attachments failed to state the amount of indebtedness claimed.

2nd. The returns on said writs showed that the pretended levies thereunder on the property in controversy were void.

3rd. The evidence showed conclusively that at the time of the pretended levies of said writs the property in controversy was in the possession of the plaintiff, and no levy was made by serving a copy of the writs and notice of the levies, as prescribed by subdivision 3 of section 149 of the Oregon Code, and were therefore void.

37 II.

There was error prejudicial to the rights of plaintiff herein in the ruling of the court admitting in evidence to the jury, over plaintiff's objections, the judgment-rolls in the case of The Powers Dry-goods Company against Joe Levy, and the case of The West Coast Grocery Company against Joe Levy, because it appeared from the record in said causes that the proceedings and judgment therein were *coram non judice* and void, in this: the court had no jurisdiction of either the person or property of the defendant in said causes, because no valid writs of attachment were ever issued or levied, and no service of the summons upon the defendant was made except by publication.

III.

There was error prejudicial to the rights of plaintiff herein in the ruling of the court admitting in evidence to the jury, over plaintiff's objections, the testimony of O. J. Kendall, F. Y. Schuck, O. H. Adsit, and —— ——writ, tending to show fraud in the transfer of the property in controversy from Joe Levy to Levine, from Levine to O. J. Kendall, and from Kendall to plaintiff, in this: there being no valid attachment or levy upon said property by defendant as marshal, said evidence was immaterial and irrelevant and the question of fraud was not an issue in the case.

IV.

There was error prejudicial to the rights of the plaintiff herein in the charge of the court to the jury submitting to them the question of fraud in plaintiff's title to the property in controversy, in this:

38 the proceedings under which the defendant sought to justify the seizure of said property being void, he had no standing in court to raise the issue of fraud.

V.

The court erred in refusing plaintiff's motion to instruct the jury to return a verdict for plaintiff because it was conclusively shown that at the time of the seizure of the goods in controversy plaintiff

was in possession thereof, and the process and levies under which defendant sought to justify being void, he was a tresspasser *ab initio*.

VI.

That by the several rulings aforesaid, whereby defendant was permitted to justify his seizure and conversion of plaintiff's property under the void proceedings in the said causes of the Powers Dry-goods Co. and the West Coast Grocery Co. against Joe Levy, plaintiff has been deprived of his property, without due process of law, by the marshal of this court, and thereby has been denied by the court the right secured to him by the Constitution of the United States, which right he claimed and invoked on the trial and now here claims and invokes.

VII.

The court erred in admitting in evidence to the jury, over the plaintiff's objections, the testimony of F. Y. Shuck, O. H. Adsit, and W. S. Staley as to the declarations of O. J. Kendall, because the same were hearsay and because the declarations of a grantor in derogation of his own title, made subsequent to sale, are incompetent to defeat such title, and because the said Kendall was a witness in the case.

39

VIII.

The court erred in instructing the jury in substance that if they found and believed that Levy sold the property of Levine and Levine to Kendall, and in each of these transfers the grantee admitted as a part of the consideration to pay plaintiff the $1,600 owing him by Levy and there was no memorandum in writing of said sales, then the same were void as in contravention of the statute of frauds, first, because the same was wholly inapplicable to any issue raised by the pleadings or evidence and was not the law of case; and, second, because by the sale to plaintiff the trust, if any, became exempted and valid prior to the pretended levy and seizure made by defendant.

IX.

The verdict of the jury is contrary to and not supported by the evidence, in this: the evidence showed that plaintiff had bought and was in possession of the goods in controversy at the time they were taken from him by defendant; that defendant made said seizure under void attachments and under void levies and was a naked tresspasser.

W. E. CREWS AND
J. H. COBB,
Counsel for Pl'ff.

Endorsed: No. 662. In the United States district court in and for the district of Alaska. Antone Marks *vs.* J. M. Shoup, U. S. marshal for Alaska, defendant. Motion for new trial. Filed December 5th, 1898. Albert D. Elliot, clerk.

And afterwards, on the 9th day of January, 1899, the court made an order denying said motion, which is in words and figures as follows, to wit:

40 United States District Court, District of Alaska.

ANTONE MARKS, Plaintiff,
vs.
JAMES M. SHOUP, as United States Marshal, Defendant. } Order Denying Motion for a New Trial.

Now, on this the 9th day of January, 1899, a motion for a new trial and to set aside the verdict made by the plaintiff herein having heretofore been argued by counsel on either side, and the court being now fully advised in the premises, it is hereby ordered and adjudged that the said motion be, and the same is hereby, denied.

By the court:

CHAS. S. JOHNSON,
U. S. Dist. Judge.

(Endorsed:) No. 662. In the United States district court, district of Alaska. Antone Marks, plaintiff, *vs.* James M. Shoup, U. S. marshal, defendant. Order denying motion for new trial. Arthur K. Delaney, attorney for defendant, Juneau, Alaska. Filed Jan. 9th, 1899. Albert D. Elliot, clerk. (Original.)

And afterwards, on the 9th of January, 1899, the court made and entered a final judgment, which is in words and figures as follows, to wit:

41 United States Dist. Court, District of Alaska.

ANTONE MARKS, Plaintiff,
vs.
JAMES M. SHOUP, as United States Marshal, Defendant. } Judgment.

This cause, coming on in its order on the calendar to be heard, was duly tried by a jury and a verdict returned and entered in favor of the defendant; and after hearing and denying the plaintiff's motion to set aside such verdict and for a new trial, now, on this the 9th day of January, 1899, on motion of the defendant, it is hereby ordered and adjudged upon such verdict that the defendant have judgment against the plaintiff upon the merits, and that said plaintiff have and recover nothing from the defendant herein, and that the defendant have judgment for his costs and disbursements of this action, to be taxed.

By the court:

CHAS. S. JOHNSON,
U. S. District Judge.

(Endorsed:) No. 662. In the United States district court for the district of Alaska. Antone Marks, plaintiff, *vs.* James M. Shoup,

U. S. marshal, defendant. Judgment. Arthur K. Delaney, attorney for defendant, Juneau, Alaska. Filed Jan. 9th, 1899. Albert D. Elliot, clerk.

42 And afterwards, on the 20th day of February, 1899, the plaintiff filed his bill of exception, which is in words and figures as follows, to wit:

In the United States District Court in and for the Di'ct of Alaska.

ANTONE MARKS
vs.
JAMES M. SHOUP. } Bill of Exception.

Be it remembered that on trial of the above-entitled cause the following proceeding- were had, to wit:

ANTONE MARKS, being first duly sworn as a witness in his own behalf, testified as follows:

I reside on Douglass island, Alaska, and have lived in Alaska about twenty-four years About the 10th day of May, 1898, I was the owner and in the possession of a stock of goods, wares, and merchandise in Juneau, Alaska. The goods were in the building on Seward St., next to B. M. Behrends. On or about that date the United States deputy marshal, W. D. Grant, came to the store and took the goods out of my possession. I declined to surrender possession, but the deputy marshal forcibly put me out of the building, took the key out of my pocket, and locked the front door.

I bought the goods a short time before that from one O. J. Kendall. I paid him six hundred dollars, cash money, and surrendered and cancelled sixteen hundred dollars of indebtedness, with the accrued interest thereon, owing me by one Joe Levy.

43 A few days before I bought the goods I was down to work on my mine, and heard that Levy had sold out and was going to leave the country. I came up to Juneau to secure the money he owed me if I could. When I reached Juneau, Levy was gone, but I went to see his wife and ask her what had been done about the money owing me. She said that Kendall had assumed my debt when he bought the stock and would pay me. I went to see Kendall, and he said he would pay my debt, as he had assumed it when he bought the stock. I refused to take him without security and told him I would have to have the money. As I understood it, the goods had been sold by Levy to one Levine, who agreed as a part of the purchase price to pay my debt, and Levine had sold to Kendall, and as a part of the consideration Kendall assumed to pay me, but I did not trust Kendall, and finally I bought the *the* goods for the debt and interest and six hundred dollars cash, which I paid him. At the time I made this trade I did not know of any indebtedness whatever owing by Levy except what he owed me. My sole purpose in making the trade was to secure or collect the debt Levy owed me, and would not otherwise have bought.

On cross-examination witness testified as follows:

The way I came to loan Levy the money was that Mrs. Levy and my wife were good friends. She had worked for the Levys before she married me. Levy came to me and wanted to borrow money, and I asked my wife what sort of people they were. She said they were good pay, and that if I loaned them the money they would pay it back. I loaned him altogether sixteen hundred dollars. He was to pay me five per cent. a month for it. I
44 took no note for it or other written evidence or security.

The transfers of the goods from Levy to Levine, and from Levine to Kendall, and from Kendall to me were not in writing, as I know of. I got no bill of sale from Kendall. The agreement between Kendall and me that he, Kendall, was to pay me the amount owing from Levy to me was not in writing, and I know of no writing in the transactions.

Plaintiff rested.

Defendant, to maintain the issues on his part, offered in evidence the judgment-roll in cause number 656, in the U. S. district court in and for Alaska, The Powers Dry-goods Co., a corporation, *vs.* Joe Levy, said judgment roll being in substance as follows, to wit:

1st. Complaint in ordinary form of action for debt for goods sold and delivered for the sum of 656.75. Second. Summons in ordinary form issued upon said complaint and returned that the defendant was not found. 3rd. Affidavit of O. H. Adsit, which was as follows, to wit:

In the United States District Court for the District of Alaska.

THE POWERS DRY-GOODS CO., a Corporation,
Plaintiff,
vs.
JOE LEVY, Defendant.
} No. —. Affidavit.

UNITED STATES OF AMERICA,
District of Alaska, } *ss:*

O. H. Adsit, being first duly sworn, deposes and says:

45 That he is the attorney-in-fact for the plaintiff herein; that defendant is indebted to plaintiff, upon contract expressed, for the direct payment of money; which said contract is made payable in this district, and is not secured by mortgage, lien, or pledge upon real or personal property, and that the said indebtedness is over and above all legal offsets and counter-claims, and that the sum for which this attachment is asked is an actual, *bona fide*, and existing debt, due and owing from defendant to plaintiff, and that the attachment is not sought and the action prosecuted to hinder, delay, or defraud the creditors of the defendant.

O. H. ADSIT.

Subscribed and sworn to before me this 3rd day of May, A. D. 1898.

A. K. DELANEY,
Notary Public for Alaska.

4th. Undertaking in attachment in proper form for proper amount. 5th, writ of attachment and return, which was as follows, to wit:

46 In the United States District Court for the District of Alaska.

THE POWERS DRY-GOODS COMPANY, a Corporation, Plaintiff, *vs.* JOE LEVY, Defendant. } No. —. Writ of Attachment.

The President of the United States of America to the marshal of the district of Alaska, Greeting:

Whereas the above-entitled action has been commenced in the court above named by the plaintiff to recover from the defendant the sum of six hundred and fifty-six and $\frac{75}{100}$ dollars ($656.75) and costs of suit, and the necessary affidavit and undertaking herein having been filed, as required by law:

Now, these presents are to command you, the said marshal, that you attach and safely keep all the property of the said defendant within your said district not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, as above mentioned, together with costs and expenses.

Witness the Honorable Charles S. Johnson, judge of the said district court, this 13th day of May, A. D. 1898.

Attest my hand and seal of said court the day and year last above written.

[SEAL.] ALBERT D. ELLIOT, *Clerk.*

47 UNITED STATES OF AMERICA, *District of Alaska*, } *ss:*

I hereby certify that I have executed the within writ of attachment by levying upon the personal property of the within-named defendant, to wit: All of the goods, wares, and merchandise situated in the one-story building one door south of B. M. Behrends' bank, on Seward street between Second and Third streets, in the town of Juneau, district of Alaska, by posting a copy of said writ of attachment on the front door of said building; also, eleven, 11, cases of boots and shoes consigned to the within-named defendant, Joseph Levy, situated in the warehouses of the Pacific Coast Steamship Company, by delivering a notice and copy of the within writ of attachment on H. F. Robinson, the agent of said Pacific Coast Steamship Co., and have all of the above-described personal property of the above-named defendant now in my possession.

Dated at Juneau, Alaska, May 14th, 1898.

JAMES M. SHOUP,
U. S. Marshal for the District of Alaska,
By WM. D. GRANT, *Deputy.*

6th. Affidavit for service of summons upon defendant by publication in ordinary, proper form. 7th. Order directing service of summons upon defendant by publication, dated July 25th, 1898. 8th. Return showing proper service upon defendant by publication and proof thereof, made on the 19th Sept., 1898. 9th. Order
48 of default, made on the 5th day of October, 1898, due and legal form. 10th. Final judgment of the court, which was as follows, to wit:

United States District Court, District of Alaska.

THE POWERS DRY-GOODS COMPANY, a Corporation, Plaintiff,
vs.
JOE LEVY, Defendant.
} Judgment.

It appearing that the summons in this action was duly served on the defendant on the 10th day of September, 1898, and that no answer, demurrer, or appearance has been entered herein, and an order of default having been entered against the defendant:

Now, therefore, upon due proofs presented by the plaintiff, it is hereby ordered and adjudged that the plaintiff have and recover of the defendant the sum of two hundred and ninety ($290.25) dollars and twenty-five cents damages, together with the costs of suit, — be taxed, and that plaintiff have execution therefor.

Dated this 5th day of October, 1898.

By the court: CHAS. S. JOHNSON, *Judge.*

11. Execution in usual form, issued upon said judgment the 5th day of October, 1898, and return thereon showing a sale under said execution of the goods, wares, and merchandise in controversy.

49 To which evidence the plaintiff, by his counsel, objected, 1st, because the attachment writ was void and issued without any jurisdiction in the court issuing the same, for the reason that the affidavit for attachment failed to state the amount of indebtedness sued for; 2nd, because the levy of said writ of attachment is void, for the reason that the writ fails to show any such acts as constitute a valid levy, and for the further reason that the goods levied upon, as shown by the evidence and admitted by the pleadings, were in the possession of the plaintiff, Antone Marks, and said writ of attachment could only have been legally levied by leaving a copy thereof and notice of levy with the party in possession of said goods; 3rd, because, there being no personal service of summons upon defendant and no valid or legal levy of the writ of attachment, the judgment rendered in said cause is void; but the court overruled said objections and permitted said judgment-roll to be read in evidence to the jury; to which ruling of the court the plaintiff then and there excepted.

Defendant next offered in evidence the judgment-roll in cause

number 657, West Coast Grocery Company *vs.* Joe Levy, in the United States district court in and for the district of Alaska; which judgment-roll was in substance as follows, to wit: 1st, complaint of ordinary form of action for debt, the sum of $577.50, for goods sold and delivered; 2nd, summons issued upon said complaint and returned that defendant cannot be found in Alaska; 3rd, affidavit of attachment, which was as follows, to wit:

50 In the United States District Court in and for the District of Alaska.

WEST COAST GROCERY COMPANY, Plaintiff,
vs.
JOE LEVY, Defendant. } No. —. Affidavit.

UNITED STATES OF AMERICA, *District of Alaska*, } *ss:*

O. H. Adsit, being first duly sworn, deposes and says:

That he is the attorney-in-fact for the plaintiff herein; that the defendant is indebted to plaintiff, upon contract expressed, for the direct payment of money; which said contract is made payable in this district and is not secured by mortgage, lien, or pledge upon real or personal property, and that the said indebtedness is over and above all legal offsets and counter-claims, and that the sum for which this attachment is asked is an actual, *bona fide*, and existing debt due and owing from the defendant to the plaintiff, and that the attachment is not sought and the action prosecuted to hinder, delay, or defraud any creditors of the defendant.

O. H. ADSIT.

Subscribed and sworn to before me this 3rd day of May, A. D. 1898.

A. K. DELANEY,
Notary Public for Alaska.

4th. Undertaking for attachment in usual ordinary form and for proper amount. 5th. Writ of attachment and return thereon, which was as follows, to wit:

51 United States District Court for the District of Alaska.

WEST COAST GROCERY COMPANY, Plaintiff,
vs.
JOE LEVY, Defendant. } No. —. Writ of Attachment.

The President of the United States of America to the marshal of the district of Alaska, Greeting:

Whereas the above-entitled action has been commenced in the court above named by the plaintiff to recover from the defendant the sum of five hundred and seventy-seven and $\frac{50}{100}$ dollars ($577.50) and costs of suit, and the necessary affidavit and undertaking herein having been filed, as required by law:

Now, these presents are to command you, the said marshal, that you attach and safely keep all of the property of said defendant within your said district not exempt from execution, or so much thereof as may be sufficient to satisfy plaintiff's demand, as above mentioned, together with costs and expenses.

Witness the Honorable Chas. S. Johnson, judge of the said district court, this 13th day of May, 1898.

Attest my hand and the seal of said court the day and year last above written.

[SEAL.] ALBERT D. ELLIOT, *Clerk.*

52 THE UNITED STATES OF AMERICA, *District of Alaska,* } ss:

I hereby certify that I have executed the within writ of attachment by levying upon the personal property of the within-named defendant, to wit, all of the goods, wares, and merchandise situated in the one-story building one door south of B. M. Behrends' bank, on Seward street between Second and Third streets, in the town of Juneau, district of Alaska, by posting a copy of said writ of attachment on the front door of said building; also eleven, 11, cases of boots and shoes consigned to the within-named defendant, Joseph Levy, situated in the warehouse of the Pacific Coast Steamship Company, by delivering a notice and copy of the within writ of attachment on H. F. Robinson, the agent of said Pacific Coast Steamship Company, and have all of the above-described personal property of the above-named defendant now in my possession.

Dated at Juneau, Alaska, May 14th, 1898.

JAMES M. SHOUP,
U. S. Marshal for the Dist of Alaska,
By WILLIAM D. GRANT, *Deputy.*

6th. Affidavit for service of summons upon defendant by publication in ordinary legal form. 7th. Order for service of summons upon defendant by publication in the usual form, made on July 25th, 1898. 8th. Proof of proper service of said summons by publication made on the 19th Sept., 1898.

53 9th. Order of default, entered October 5th, 1898.

10th. Judgment of the court, which was as follows, to wit:

United States District Court, District of Alaska.

THE WEST COAST GROCERY COMPANY, a Corporation, Plaintiff, *vs.* JOE LEVY, Defendant. } Judgment.

It appearing that the summons in this action was duly served on the defendant on the 10th day of September, 1898, and that no answer, demurrer, or appearance has been entered herein, and an order of default having been entered against the defendant:

Now, therefore, upon due proofs presented by the plaintiff, it is hereby ordered and adjudged that the plaintiff have and recover of the defendant the sum of five hundred and seventy-seven dollars and fifty cents ($577.50) damages, together with costs of suit, — be taxed, and that the plaintiff have execution therefor. Dated this 5th day of October, 1898.

By the court:

CHARLES S. JOHNSON, *Judge.*

11th. Execution issued upon said judgment, and in the usual form, and return thereof, showing a levy upon and sale of the goods in controversy; to which evidence the plaintiff objected, 1st, because the attachment writ was void and issued without any jurisdiction in the court issuing the same, for the reason that the affidavit
54 for attachment failed to state the amount of indebtedness sued for; 2nd, because the levy of said writ of attachment is void, for the reason that the return fails to show any such acts as constitute a valid levy, and for the further reason that the goods levied upon, as shown by the evidence and admitted by the pleadings to have been in the possession of the plaintiff, Antone Marks, and said writ of attachment could only have been levied by leaving a copy thereof and notice of levy with the party in possession of said goods; 3rd, because, there being no personal service of summons upon defendant and no valid or legal levy of the writ of attachment, the judgment rendered in said cause is void; but the court overruled said objections and permitted the said judgment-roll to be read in evidence to the jury; to which ruling of the court the plaintiff then and there excepted.

The defendant next offered in evidence the testimony of O. H. Adsit, F. Y. Schuck, and O. J. Kendall, and which tended to prove and would have supported a finding that in the months of April and May, 1898, Joe Levy was largely indebted to the Powers Dry-goods Company, the West Coast Grocery Company, the Willamette Tent and Awning Company, and others, and was wholly insolvent, and that he transferred the stock of goods in controversy to one Levine without consideration and for the purpose of defrauding his creditors, and Levine transferred the same stock to O. J. Kendall, and Kendall transferred the same stock to Antone Marks, all without consideration and for the purpose of defrauding the creditors of Joe Levy, and especially the Powers Dry-goods Co. and the West Coast Grocery
55 Company; to which testimony plaintiff objected because the writs of attachment in the case of The Powers Dry-goods Company against Joe Levy and The West Coast Grocery Company against Joe Levy were void for the reason that the affidavits for said writs failed to state the amount of indebtedness claimed. 2nd. Because the levies made under said writs were void for the reason that no such facts were showed in the returns thereto as would constitute a valid levy, and because the goods pretended to be levied upon, being in the possession of Antone Marks and not in the possession of Joe Levy, the defendant in said writs, a valid levy could

only have been made by delivering a copy of the writs and notice of the levy, as provided in subdivision three of section 149 of the Code of Oregon in force in 1884. 3rd. Because, there being no attachment and no personal service of process, the whole proceeding under which the marshal sought to justify were *coram non judice* and void and the evidence offered was immaterial and irrelevant to any issue properly in the case. But the court overruled said objections and allowed said testimony to go to the jury; to which ruling of the court the plaintiff then and there excepted.

Plaintiff thereupon moved the court to instruct the jury to render a verdict for the plaintiff for the reason that the proceedings in the case of The Powers Dry-goods Co. against Joe Levy and The West Coast Grocery Company against Joe Levy being void, the issues of fraud in the transfers under which plaintiff claimed title to
56 the goods in controversy should be withdrawn from the jury, and plaintiff's possession and title being undisputed except under said issue, he was entitled to a verdict; but the court overruled said motion; to which ruling of the court the plaintiff then and there excepted.

The court thereupon instructed the jury as follows:

"If you believe and find from the evidence that the goods in controversy were transferred by Joe Levy to one Levine without consideration or for the purpose of hindering, delaying, and defrauding the creditors of the said Joe Levy, and pursuant to the same purpose Levine transferred the goods to Kendall, and pursuant to the same purpose and design or with knowledge or notice thereof Kendall transferred them to the plaintiff Marks, you will find for the defendant;" to which charge of the court plaintiff then and there excepted for the reason that, having failed to show valid attachment writs and valid levies thereunder in the cases of The Powers Dry-goods Co. against Joe Levy and The West Coast Grocery Company against Joe Levy, defendant was not in a position to attack said transfers as fraudulent, and said charge was not responsive to any issue properly made by the evidence.

The court further instructed the jury as follows, to wit:

"If you find and believe from the evidence that Joe Levy sold and transferred the goods in controversy to one Levine, and Levine sold and transferred them to Kendall, and Kendall transferred them to Marks, and that in each of these transfers Levine and Kendall respectively assumed to pay any debt owing from Levy to Marks, such agreement would be void in law unless in writing; and
57 if you find from the evidence that there was an indebtedness from Levy to Marks and an agreement upon the part of Levine and Kendall to assume that indebtedness, you will disregard such agreement unless you find from the evidence that it was in writing, as an oral agreement to that effect is void in law, and in that case your verdict must be for the defendant;" to which charge of the court the plaintiff excepted, because not the law applicable to the facts stated or to any issue in the case.

And the plaintiff tenders this his bill of exception and asks that the same be allowed, signed, filed, and made a part of the record

herein; which is accordingly done, within the time fixed and allowed by the court, this the 20th day of February, 1899.

CHARLES S. JOHNSON,
Judge of the U. S. Di'ct Court in and for the Di'ct of Alaska.

The above and foregoing bill of exceptions has been examined and found to be correct, and it is hereby stipulated and agreed that it shall be allowed and signed as the bill of exceptions of the plaintiff in the said cause this 18th day of February, 1899.

ARTHUR K. DELANEY,
Att'y for J. M. Shoup, Def't.
J. H. COBB,
Att'y for Antone Marks, Pl'ff.

(Endorsed:) No. 662. In the U. S. district court in and for the district of Alaska. Antone Marks, plaintiff, *vs.* J. M. Shoup, U. S. marshal for Alaska, defendant. Bill of exceptions. Filed February 20th, 1899. Albert D. Elliot, clerk. W. E. Crews and J. H. Cobb, attorneys for plaintiff.

58 Afterwards, on March 22nd, 1899, the plaintiff filed his petition for writ of errors, which is in words and figures as follows, to wit:

In the United States District Court in and for the District of Alaska.

ANTONE MARKS, Appellant,
vs.
J. M. SHOUP, Appellee.
} Petition for Writ of Error.

To the Honorable Charles S. Johnson, judge of the United States district court in and for the district of Alaska:

The petition of Antone Marks respectfully shows to the court as follows, to wit:

That your petitioner is the plaintiff in the above entitled and numbered cause; that at a legal term of said court held at Juneau, Alaska, on January 9th, 1899, a final judgment therein was entered, wherein it was adjudged that your petitioner take nothing by his suit; that the defendant, J. M. Shoup, recover of plaintiff for costs and disbursements therein greatly to the injury and prejudice of your petitioner; which said judgment and the proceedings incident thereto are erroneous in many particulars, to the great injury and prejudice of your petitioner, plaintiff in said suit; that manifest errors have been made in this cause in the rendering of said judgment, to the great damage of your petitioner, as fully appears from the bill of exceptions therein and the assignments of error filed herewith.

Wherefore, to the end that your petitioner may obtain relief in the premises and an opportunity to show and have corrected
59 the errors complained of, your petitioner prays that he may be allowed a writ of error in said cause, and that upon the giving by your petitioner of a bond, as by law required, a tran-

script of the records and all papers in this cause, duly authenticated, may be transmitted to the honorable the Supreme Court of the United States, at Washington, D. C., for the determination of said writ of error.

ANTONE MARKS, *Petitioner*,
By J. H. COBB,
One of His Counsel of Record Herein.

Dated Juneau, Alaska, March 3rd, 1899.

(Endorsed:) No. 662. In the United States district court in and for the district of Alaska. Antone Marks, plaintiff, *vs.* J. M. Shoup, U. S. marshal for Alaska, defendant. Petition for writ of error. Filed March 22nd, 1899. Albert D. Elliot, clerk.

And afterwards, on March 22nd, 1899, the court made an order allowing said writ of error, which is in words and figures as follows, to wit:

60 In the United States District Court in and for the District of Alaska.

ANTONE MARKS *vs.* J. M. SHOUP. } Order Allowing Writ of Error.

On this 22nd day of March, 1899, came the plaintiff, Antone Marks, by his attorney, J. H. Cobb, and filed and presented to the court his petition praying for an allowance of a writ of error herein, and that a transcript of the records, proceedings, and papers upon which the judgment herein was rendered, and all other papers, records, and files in said cause, duly authenticated, be sent to the honorable the Supreme Court of the United States, at Washington, D. C., and that such other and further proceedings may be had as may be proper in the premises.

And the court, having duly considered said petition, hereby allows the writ of error, upon the said plaintiff, Antone Marks, giving a bond of the sum of two hundred and fifty dollars, conditioned as the law directs.

Done in open court, at Sitka, Alaska, this the 22nd day of March, 1899.

CHARLES S. JOHNSON,
Judge of the U. S. Dist. Court in and for the Dist. of Alaska.

(Endorsed:) No. 662. In the United States district court in and for the district of Alaska. Antone Marks, plaintiff, *vs.* J. M. Shoup, U. S. marshal for Alaska, defendant. Order allowing writ of error. Filed March 22nd, 1899. Albert D. Elliot, clerk.

And afterwards, on March 22nd, 1899, the plaintiff filed his bond for writ of error, which is in words and figures as follows, to wit:

61 In the United States District Court in and for the District of Alaska.

ANTONE MARKS
vs.
J. M. SHOUP. } Bond for Writ of Error.

Know all men by these presents that we, Antone Marks, as principal, and Mareus J. Cohn and —— ——, as sureties, all of the town of Juneau, district of Alaska, are held and firmly bound unto the above-named J. M. Shoup in the sum of two hundred and fifty ($250) dollars, to be paid to the said J. M. Shoup, and for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 3rd day of March, A. D. 1899.

Whereas the above-bound Antone Marks has prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered in the above-entitled cause by the judge of the district court of the United States in and for the district of Alaska on the 9th day of January, 1899, wherein it was adjudged that the plaintiff in said suit, Antone Marks, take nothing, and that the defendant, the said J. M. Shoup, go hence without day and recover from the said plaintiff all costs and disbursements therein:

Now, therefore, the condition of this obligation is such that if the above-named Antone Marks shall prosecute his said writ of
62 error to effect and answer all damages and costs if he fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

ANTONE MARKS,
By J. H. COBB,
One of His Attorneys of Record.
MARCUS J. COHN.

Sealed and delivered and taken and acknowledged this 3rd day of March, 1899, before me—

NORMAN E. MALCOLM,
[SEAL.] *United States Commissioner in and for Alaska.*

Approved by—
CHARLES S. JOHNSON,
Judge of the Di'ct Court in and for the District of Alaska.

(Endorsed:) No. 662. In the United States district court in and for the district of Alaska. Antone Marks, plaintiff, *vs.* J. M. Shoup, U. S. marshal for Alaska, defendant. Bond for writ of error. Filed the 22nd day of March, 1899. Albert D. Elliot, clerk.

And afterwards, on March 22nd, 1899, a writ of error was issued in said cause, which is in words and figures as follows, to wit:

63 In the United States District Court in and for the District of Alaska.

ANTONE MARKS
vs.
JAMES M. SHOUP. } Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States in and for the district of Alaska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you or some of you, between Antone Marks, plaintiff, *vs.* J. M. Shoup, defendant, a manifest error hath happened, to the great damage of the said plaintiff, Antone Marks, as by his complaint appears, we, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, to the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

64 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the 22nd day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

Attest my hand and the seal of the United States district court for the district of Alaska, at the clerk's office, at Sitka, Alaska, on the day and year last above written.

ALBERT D. ELLIOT,
[SEAL.] *Clerk of the United States District Court in and for the District of Alaska.*

Allowed.
CHARLES S. JOHNSON,
Judge of the United States District Court in and for the Di'ct of Alaska.

(Endorsed:) No. 662. In the United States district court in and for the district of Alaska. Antone Marks, plaintiff, *vs.* J. M. Shoup, U. S. marshal for Alaska, defendant. Writ of error. Filed March 22nd, 1899. Albert D. Elliot, clerk.

65 And afterwards, on said day, the plaintiff filed his assignment of errors, which is in words and figures as follows, to wit:

In the United States District Court in and for the District of Alaska.

ANTONE MARKS
vs.
J. M. SHOUP. } Assignment of Errors.

Now comes the plaintiff in error, Antone Marks, by his attorneys, W. E. Crews and J. H. Cobb, and assigns the following errors committed by the court on the trial of the above-entitled cause, to wit:

I.

The court erred in admitting in evidence to the jury, over plaintiff's objections, the judgment-roll in the case of The Powers Dry-goods Company *vs.* Joe Levy, in substance as follows:

1st, complaint in ordinary form of action for debt for goods sold and delivered for the sum of $656.75; 2nd, summons in ordinary form, issued upon said complaint and returned that the defendant was not found; 3rd, affidavit of O. H. Adsit, which was as follows, to wit:

66 In the United States District Court in and for the District of Alaska.

THE POWERS DRY-GOODS COMPANY, a Corporation, Plaintiff,
vs.
JOE LEVY, Defendant. } No. —. Affidavit.

UNITED STATES OF AMERICA,
District of Alaska, } *ss:*

O. H. Adsit, being first duly sworn, deposes and says that he is the attorney-in-fact for the plaintiff herein; that defendant is indebted to plaintiff, upon contract expressed, for the direct payment of money; which said contract is made payable in this district, and is not secured by mortgage, lien, or pledge upon real or personal property, and that the said indebtedness is over and above all legal offsets and counter-claims, and that the sum for which this attachment is asked is an actual, *bona fide*, and existing debt, due and owing from defendant to the plaintiff, and that the attachment is not sought and the action prosecuted to hinder, delay, or defraud any creditors of the defendant.

O. H. ADSIT.

Subscribed and sworn to before me this 3rd day of May, A. D. 1898.

A. K. DELANEY,
Notary Public for Alaska.

67 4th. Undertaking in attachment in proper form for proper amount. 5th. Writ of attachment and return, which was as follows, to wit:

In the United States District Court for the District of Alaska.

THE POWERS DRY-GOODS COMPANY, a Corporation, Plaintiff,
vs.
JOE LEVY, Defendant.
No. —.
Writ of Attachment.

The President of the United States of America to the marshal of the district of Alaska, Greeting:

Whereas the above-entitled action has been commenced in the court above named by the plaintiff to recover from the defendant the sum of six hundred and fifty six and $\frac{75}{100}$ dollars ($656.75) and cost- of suit, and the necessary affidavit and undertaking herein having been filed, as required by law:

Now, these presents are to command you, the said marshal, that you attach and safely keep all of the property of the said defendant within your district not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, as above mentioned, together with costs and expenses.

Witness the Honorable Charles S. Johnson, judge of the said district court, this 13th day of May, A. D. 1898.

Attest my hand and the seal of said court the day and year last above written.

[SEAL.] ALBERT D. ELLIOT, *Clerk.*

68 THE UNITED STATES OF AMERICA, *District of Alaska*, } ss:

I hereby certify that I have executed the within writ of attachment by levying upon the personal property of the within-named defendant, to wit, all the goods, wares, and merchandise situated in the one-story building one door south of B. M. Behrends' bank, on Seward street between Second and Third Sts., in the town of Juneau, district of Alaska, by posting a copy of the said writ of attachment on the front door of said building; also 11 cases of boots and shoes consigned to the within-named defendant, Joseph Levy, situated in the warehouse of the Pacific Coast Steamship Company, by delivering a notice and copy of the within writ of attachment on H. F. Robinson, the agent of said Pacific Coast Steamship Company, and have all of the above described personal property of the within named defendant now in my possession.

Dated at Juneau, Alaska, May 14th, 1898.

JAMES M. SHOUP,
U. S. Marshal for the District of Alaska,
By WILLIAM D. GRANT, *Deputy.*

6th. Affidavit for service of summons upon defendant by publication in ordinary, proper form. 7th. Order directing service of summons upon defendant by publication, dated July 25th, 1898. 8th. Return showing proper service upon defendant by publication

and proof thereof, made on the 19th of Sept., '98. 9th. Order
69 of default, made on the 5th day of October, 1898, due and legal form. 10. Final judgment of the court, which was as follows, to wit:

United States District Court, District of Alaska.

THE POWERS DRY-GOODS COMPANY, a Corporation, Plaintiff, *vs.* JOE LEVY, Defendant. } Judgment.

It appearing that the summons in this action was duly served on the defendant on the 10th day of September, 1898, and that no answer, demurrer, or appearance has been entered herein, and an order of default having been entered against the defendant:

Now, therefore, upon due proofs presented by the plaintiff, it is hereby ordered and adjudged that the plaintiff have and recover of the defendant the sum of two hundred and ninety dollars and twenty-five cents ($290.25) damages, together with the costs of suit, to be taxed, and that the plaintiff have execution therefor.

Dated this 5th day of October, 1898.

By the court: CHARLES S. JOHNSON, *Judge.*

11th. Execution in usual form, issued upon said judgment the 5th day of October, 1898, and return thereon showing a
70 sale under said execution of the goods, wares, and merchandise in controversy.

II.

The court erred in admitting in evidence to the jury, over plaintiff's objections, the judgment-roll in the case of The West Coast Grocery Company against Joe Levy, in substance as follows:

1st. Complaint of ordinary form of action for debt — the sum of $577.50 for goods sold and delivered. 2nd. Summons issued upon said complaint and returned that defendant cannot be found in Alaska. 3rd. Affidavit of attachment, which was as follows, to wit:

In the United States District Court in and for the District of Alaska.

WEST COAST GROCERY COMPANY, Plaintiff, *vs.* JOE LEVY, Defendant. } No. —. Affidavit.

UNITED STATES OF AMERICA, *District of Alaska,* } *ss:*

O. H. Adsit, being first duly sworn, deposes and says that he is the attorney-in-fact for the plaintiff herein; that defendant is indebted to plaintiff, upon contract expressed, for the direct payment of money, which said contract is made payable in this district, and is not secured by mortgage, lien, or pledge upon real or personal

property, and that the said indebtedness is over and above
71 all legal offsets and counter-claims, and that the sum for which this attachment is asked is an actual, *bona fide*, and existing debt due and owing from the defendant to the plaintiff, and that the attachment is not sought and the action prosecuted to hinder, delay, or defraud any creditors of the defendant.

O. H. ADSIT.

Subscribed and sworn to before me this 3rd day of May, A. D. 1898.

ARTHUR K. DELANEY,
Notary Public for Alaska.

4th. Undertaking for attachment in usual, ordinary form and for proper amount. 5th. Writ of attachment and return thereon, which was as follows, to wit:

United States District Court for the District of Alaska.

West Coast Grocery Company, Plaintiff, vs. Joe Levy, Defendant.	No. —.	Writ of Attachment.

The President of the United States of America to the marshal of the district of Alaska, Greeting:

Whereas the above-entitled action has been commenced in the court above named by the plaintiff to recover from the defendant the sum of five hundred and seventy-seven and $\frac{50}{100}$ dollars ($577.50) and costs of suit, and the necessary affidavit and undertaking herein having been filed, as required by law:

72 Now, these presents are to command you, the said marshal, that you attach and safely keep all of the property of the said defendant within your said district not exempt from execution, or so much thereof as may be sufficient to satisfy plaintiff's demand, as above mentioned, together with costs and expenses.

Witness the Honorable Charles S. Johnson, judge of the said district court, this 13th day of May, A. D. 1898.

Attest my hand and the seal of said court the day and year last above written.

[SEAL.] ALBERT D. ELLIOT, *Clerk.*

The United States of America, *District of Alaska*, } ss:

I hereby certify that I have executed the within writ of attachment by levying upon the personal property of the within-named defendant, to wit, all the goods, wares, and merchandise situated in the one-story building one door south of B. M. Behrends' bank, on Seward street between Second and Third streets, in the town of Juneau, district of Alaska, by posting a copy of said writ of attach-

me on the front door of said building; also eleven, 11, cases of boots and shoes consigned to the within-named defendant, Joseph Levy, situated in the warehouse of the Pacific Coast Steamship Company, by delivering a notice and copy of the within writ of attachment on H. F. Robinson, the agent of said Pacific Coast Steamship Co., and have all of the above-described personal property of the above-named defendant now in my possession.

Dated at Juneau, Alaska, May 14th, 1898.

J. M. SHOUP,
U. S. Marshal for Alaska,
By WM. D. GRANT, *Deputy.*

73 6th. Affidavit for service of summons upon defendant by publication in ordinary, legal form. 7th. Order for service of summons upon defendant by publication in the usual form, made on July 25th, 1898. 8th. Proof of proper service of said summons by publication made on the 19th of September, 1898. 9th. Order of default, entered October 5th, 1898. 10th. Judgment of the court, which was as follows, to wit:

United States District Court, District of Alaska.

THE WEST COAST GROCERY COMPANY, a Corporation, Plaintiff,
vs.
JOE LEVY, Defendant. } Judgment.

It appearing that the summons in this action was duly served on the defendant on the 10th day of September, 1898, and that no answer, demurrer, or appearance has been entered herein, and an order of default having been entered against the defendant:

Now, therefore, upon due proofs presented by the plaintiff, it is hereby ordered and adjudged that the plaintiff have and recover of the defendant the sum of five hundred and seventy-seven dollars and fifty cents ($577.50) damages, together with costs of suit, to be taxed, and that the plaintiff have execution therefor.

Dated this 5th day of October, 1898.

By the court:

CHARLES S. JOHNSON, *Judge.*

74 11th. Execution issued upon said judgment and in the usual form and return thereof showing a levy upon and sale of the goods in controversy.

III.

The court erred in admitting in evidence to the jury, over plaintiff's objections, the testimony of O. H. Adsit, F. Y. Schuck, and O. J. Kendall, tending to prove that in the months of April and May, 1898, Joe Levy was largely indebted to the Powers Dry-goods Company, the West Coast Grocery Company, the Willamette Tent and Awning Co., and others, and was wholly insolvent, and that he transferred the stock of goods in controversy to one Levine with-

out consideration, and for the purpose of defrauding his creditors, and Levine transferred the same stock to O. J. Kendall, and Kendall transferred the same stock to Antone Marks, all without consideration, and for the purpose of defrauding the creditors of Joe Levy, and especially the Powers Dry-goods Company and the West Coast Grocery Company.

IV.

The court erred in refusing plaintiff's motion to instruct the jury to return a verdict for the plaintiff.

V.

The court erred in giving the following instruction to the jury, to wit:

If you believe and find from the evidence that the goods in controversy were transferred by Joe Levy to one Levine without consideration or for the purpose of hindering, delaying, and defrauding the creditors of the said Joe Levy, and pursuant to the same
75 purpose Levine transferred the goods to *to* Kendall, and pursuant to the same purpose and design, or with knowledge or notice thereof, Kendall transferred them to the plaintiff Marks, you will find for the defendant.

VI.

The court erred in giving the following instructions to the jury, to wit:

"If you find and believe from the evidence that Joe Levy sold and transferred the goods in controversy to one Levine, and Levine sold and transferred them to Kendall, and Kendall transferred them to Marks, and in each of these transfers Levine and Kendall respectively assumed to pay any debt owing by Levy to Marks, such agreement would be void in law unless in writing; and if you find from the evidence that there was an indebtedness from Levy to Marks and an agreement upon the part of Levine and Kendall to assume that indebtedness, you will disregard such agreement unless you find from the evidence that it was in writing, as an oral agreement to that effect is void in law, and in that case your verdict must be for the defendant."

And for the said errors and others manifest of record the said plaintiff in error prays that the said judgment of the district court in and for the district of Alaska be reversed and this cause remanded with instructions to award a new trial, and for such other orders and instructions as to the court may seem right and meet in the premises.

W. E. CREWS AND
J. H. COBB,
Counsel for Plaintiff in Error, Antone Marks.

76 Due and legal service of the within assignment of errors is hereby accepted and admitted this the 3rd day of April, 1899.

ARTHUR K. DELANEY,
Attorney for Defendant.

(Endorsed:) No. 662. In the United States district court in and for the district of Alaska. Antone Marks, plaintiff, *vs.* J. M. Shoup, U. S. marshal for Alaska, defendant. Assignment of errors. Filed March 22nd, 1899. Albert D. Elliot, clerk.

And afterwards, on the same day, citation in error was issued in said cause, which is in words and figures as follows, to wit:

77 In the United States District Court in and for the Distirct of Alaska.

ANTONE MARKS
vs.
JAMES M. SHOUP. } Citation in Error.

UNITED STATES OF AMERICA, *ss:*

To J. M. Shoup, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October, 1899, pursuant to a writ of error filed in the clerk's office of the district court of the United States in and for the district of Alaska, wherein Antone Marks is plaintiff in error and J. M. Shoup the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 22nd day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

CHARLES S. JOHNSON,
District Judge.

Due and legal service of the within citation in error is hereby accepted and admitted this the 3rd day of April, 1899.

ARTHUR K. DELANEY,
Attorney for Defendant in Error.

(Endorsed:) No. 662. In the United States district court in and for the district of Alaska. Antone Marks, plaintiff, *vs.* J. M. Shoup, U. S. marshal for Alaska, defendant. Citation in error. Filed April 21, 1899. Albert D. Elliot, clerk.

78 Afterwards, on the 21st day of April, 1899, the following further proceedings were had and appear of record in said cause, to wit:

In the United States District Court in and for the District of Alaska.

ANTONE MARKS
vs.
J. M. SHOUP, U. S. Marshal. } Order.

Now, on this day, came on to be heard the application of Antone Marks, plaintiff in error, for an order herein extending and enlarging the time within which the clerk of this court may make his return to the writ of error heretofore issued and served in this cause, and, the court having heard said application and being fully advised in the premises,—

It is hereby ordered that the time within which the clerk may make return upon said writ of error and docket this cause in the appellate court is hereby extended and enlarged for a period of thirty days (30) from the expiration of the time within which otherwise said return should be made and said cause docketed.

Done in open court this the 21st day of April, 1899.

CHARLES S. JOHNSON, *Judge.*

"Endorsed: No. 662. In the United States district court in and for the district of Alaska. Antone Marks, plaintiff, *vs.* J. M. Shoup, U. S. marshal for Alaska, defendant. Order enlarging time to docket. Filed April 21, 1899. Albert D. Elliot, clerk."

79 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *District of Alaska,* } *ss:*

I, Albert D. Elliot, clerk of the United States district court in and for the district of Alaska, do hereby certify that the foregoing pages, numbered from one to seventy-nine, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Antone Marks, plaintiff, *vs.* J. M. Shoup, U. S. marshal, defendant, as the same remains of record and on file at said office.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be hereunto affixed, at the town of Sitka, in said district, the sixth day of May, A. D. 1899.

[Seal United States District Court, Alaska.]

ALBERT D. ELLIOT, *Clerk.*

80 ANTONE MARKS, Plaintiff in Error,
vs.
JAMES M. SHOUP, Defendant in Error.

Cause depending in the United States Supreme Court on writ of error of the district court for the district of Alaska.

It is hereby agreed and stipulated between the plaintiff in error and the defendant in error, by their respective counsel, that the following parts of the record are the only parts material for the

consideration and determination of the above cause, and that said parts of the record shall be printed and no other, to wit:

1st. Complaint.
2nd. Answer.
3rd. Reply.
4th. Supplemental answer.
5th. Verdict.
6th. Motion for new trial.
7th. Order denying motion for new trial.
8th. Judgment.
9th. Bill of exceptions.
10th. Petition for writ of error.
11th. Order allowing writ of error.
12th. Bond for writ of error.
13. Writ of error.
14th. Assignment of errors.
15. Citation in error.
16th. Order extending time to docket cause.
17th. Clerk's certificate & cost bill.
18th. " " to transcript of record.

81 Witness our hands this the 14th day of August, 1899.

W. E. CREWS AND
J. H. COBB,
Attorneys for Plaintiff in Error.
STOCKSLAGER & HEARD AND
ARTHUR K. DELANEY,
Attorneys for Defendant in Error.
S. M. STOCKSLAGER,
GEORGE C. HEARD,
Att'ys for Def't in Error.

OSCAR FOOTE,
For Pl'f in Error.

82 [Endorsed:] No. —. In the Supreme Court of the United States. Antone Marks, plaintiff in error, *vs.* J. M. Shoup, U. S. marshal for Alaska, defendant in error. Stipulation for printing the record. Oscar Foote and W. E. Crews and J. H. Cobb, attorneys for pl'ff in error; office, Juneau, Alaska.

83 [Endorsed:] File No., 17,442. Supreme Court U. S., October term, 1899. Term No., 328. Antone Marks, pl'ff in error, *vs.* James M. Shoup. Stipulation as to printing record. Filed Jan'y 2, 1900.

Endorsed on cover: File No., 17,442. Alaska D. C. U. S. Term No., 328. Antone Marks, plaintiff in error, *vs.* J. M. Shoup. Filed June 22nd, 1899.

No. 82.

NOV 1043
JAMES H. McKENNEY,
Clerk.

Brf. of Dudley, Pettit & Conner for P. E.

Supreme Court

OF THE UNITED STATES

Filed Nov. 8, 1900.

October Term, 1899.

NO. ~~320~~ 82

ANTONE MARKS, Plaintiff in Error.

vs.

J. M. SHOUP, Defendant in Error.

Error to the District Court in and For the District of Alaska

Brief of Plaintiff in Error

W. E. CREWS and J. H. COBB,
Counsel for Plaintiff in Error

PRESS OF THE
DAILY ALASKA DISPATCH
JUNEAU

IN THE

Supreme Court

OF THE UNITED STATES

October Term, 1899.

NO. 328

ANTONE MARKS, Plaintiff in Error,

vs.

J. M. SHOUP, Defendant in Error.

Error to the District Court in and For the District of Alaska

Brief of Plaintiff in Error

W. E. CREWS and J. H. COBB,
Counsel for Plaintiff in Error

STATEMENT OF THE NATURE AND RESULT OF THE SUIT.

This was a suit at law for damages for the sum of $6000.00, brought by Antone Marks, plaintiff in error, against J. M. Shoup, Marshal of Alaska, defendant in

error, alleged to have been caused by the taking from plaintiff's possession and conversion of a certain stock of goods, wares and merchandise, the property of plaintiff, which taking was alleged to have been done by the defendant under color of his office by and through his deputy. (Printed record p. 1 and 2).

Defendant answered, admitting the taking, and plead a justification under two certain writs of attachment issued out of the District Court of Alaska against one Joe Levy, one in the case of Powers Dry Goods Company vs. Joe Levy, and the other The West Coast Grocery Co. vs. Joe Levy; that the goods sued for were transferred to third persons under whom the plaintiff claims, and said transfers were in fraud of creditors and were void, and that on the 16th day of May, 1898, defendant as marshal levied upon said goods and ever since said time and now hold the same thereunder. (Printed Record pp. 3-5).

Plaintiff replied that he had bought the goods from third persons for a valuable consideration, denied all fraud, and further plead that during all the time from prior to the commencement of the actions mentioned in defendant's answer until and at the time of the taking, he was in the actual and exclusive possession of the goods, and denied that defendant ever made any levy whatevsr upon said goods. (Printed R. 6 and 7).

Defendant filed a supplemental answer at the trial setting up that the attachments had merged in judgments which had been satisfied out of the proceeds of a sale of the goods. (Printed R. 7 and 8).

The case was tried before a jury and resulted in a verdict for defendant. (Printed R. 9).

Motion for a new trial was made (Priuted R. 9-11)

and overruled (Printed Record 12) and judgment entered for defendant (R. 12).

The Bill of Exceptions was settled, allowed and filed in time (R. 13-21), a writ of error sued out, (R. 22-25) assignments of error filed, (R. 25-30) and the cause is now here presented for correction and revision.

The facts so far as material to the questions to be presented are as follows:

At the time of the taking complained of the plaintiff was in the actual, exclusive possession of the goods sued for, which were in a store building in the town of Juneau. The marshal, under the writs of attachment against Joe Levy, mentioned in his answer, entered the store, took the key from plaintiff's pocket, put him out of the house and locked the door—in other words forcibly dispossessed plaintiff of the goods (R. 13).

The above facts are undisputed, the testimony being all one way, and they are also admitted in the pleadings.

The goods originally belonged to Joe Levy, who sold them to one Levine, by verbal sale and actual delivery, and as a part of the consideration Levine assumed to pay a debt due to Plaintiff Marks. Levine then sold and delivered to one Kendall, and Kendall assumed to pay the same debt. Kendall sold and delivered to plaintiff; and there was evidence tending to show that all these transfers were in fraud of creditors.

The errors assigned relate to the rulings of the Court upon the admission of evidence and instructions to the jury, and we will briefly state the nature of the

questions raised and to be presented before taking up the assignments themselves. These questions are:

1st. Is a writ of attachment under the laws of Oregon in force in Alaska void because the affidavit therefor fails to show the amount of the indebtedness sued for?

2d. Is a levy of such writ void when the return of the marshal shows it was made solely by posting a copy of the writ on the door of the store in which the goods claimed to have been levied upon were situated?

3d. Under the laws of Oregon in force in Alaska, is a levy on personal property made by actual seizure and taking possession thereof by the marshal, where such property is in the hands of a third person claiming it, void?

4th. If either the writ, or the levy under it, is void can the marshal justify thereunder?

5th. Is a sale and delivery of goods not evidenced by a writing, valid in law, and sufficient to pass title, when as a part consideration therefor the buyer assumed to pay a debt of the seller owing to some third person?

All these questions (except the 4th, which became immaterial in view of the ruling on the others) were in effect answered in the negative, by the trial court.

The *First and Second Assignments* relate to the same error, and will be considered together. (R. 25-29)

These two assignments question the correctness of the rulings of the Court in admitting in evidence to the jury the judgment rolls in the cases of Powers Dry

Goods Co. vs. Joe Levy, and West Coast Grocery Co. vs. Joe Levy. These two judgment rolls were identical except as to names of plaintiffs and amounts sued for. The bill of exceptions (R. 14-19) shows that both these suits were ordinary actions for debt and attachment.

Summons was issued and not served [see R. 14 and 17], and substituted service of summons was afterward obtained by publication (see R. 16 and 18). The affidavits for writs of attachment wholly failed to make any mention of the amount of indebtedness claimed. (See R. 14 and 17).

The returns upon the writs of attachment were as follows: "I hereby certify that I have executed the within writ of attachment by levying upon the personal property of the within named defendant, towit: All the goods, wares and merchandise situated in the one story building one door south of B. M. Behrends' bank on Seward street, between Second and Third streets, in the town of Juneau, District of Alaska, by posting a copy of said writ of attachment on the front door of said building; also 11 cases of boots and shoes consigned to the within named defendant Joseph Levy, situated in the warehouse of the Pacific Coast Steamship Company, by delivering a notice and copy of the within writ of attachment on H. F. Robinson, the agent of said Pacific Coast Steamship Company, and have all the above described personal property of the within named defendant now in my possession.

Dated at Juneau, Alaska, May 14th, 1988.

[Signed] JAMES M. SHOUP,

U. S. Marshal for the District of Alaska.

By WM. D. Grant, Deputy."

(See R. p. 15 and 18) (also p. 26 and 28).

(The 11 cases of boots and shoes were not involved in this suit).

Judgments by default were taken in these two cases against Levy, based upon the substituted service of summons [R. 16 and 18] and executions were issued and satisfied out of the goods in controversy. [R. 16 and 19]

Plaintiff objected to the introduction in evidence of these judgment-rolls,

1st. Because the writ of attachment was void and issued without any jurisdiction in the Court issuing the same, for the reason that the affidavit for attachment failed to state the amount of indebtedness sued for.

2d. Because the levy of said writ of attachment is void for the reason that the return fails to show any such acts as constitute a valid levy, and for the further reason that the goods levied upon as shown by the evidence and admitted by the pleadings were in the possession of the plaintiff Antone Marks and said writ of attachment could only have been levied by leaving a copy thereof and notice of levy with the party in possession of said goods.

3d. Because there being no personal service of the summons upon defendant and no valid or legal levy of the writs of attachment the judgment rendered in said causes were void. [R. 16 and 19]. But the Court overruled the objections and permitted the evidence to go to the jury; to which rulings plaintiff reserved his exceptions, and assigned error.

SUBSIDIARY PROPOSITION OF LAW HEREUNDER.

The Laws of Oregon in force on May 17th, 1884,

were extended to, and became and are the laws of the District of Alaska, except where in conflict with the laws of the United States.

(Act of Congress, May 17, 1884—23 Stat. at Large 24).

FIRST PROPOSITION OF LAW HEREUNDER.

A writ of attachment issued upon an affidavit which wholly fails to specify the amount of the indebtedness claimed, is void.

AUTHORITIES.

"A writ of attachment shall be issued by the clerk " of the Court in which the action is pending, when- " ever the plaintiff or anyone in his behalf shall " make an affidavit showing:

"1—That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counter claims) upon a contract" etc.

1 Hill's Code, Oregon, Ed. 1887, § 145, Lsws of Oregon 1876, p. 35.

Drake on Att. (7th Ed.) §§ 87a-89a.

STATEMENT.

The affidavits wholly failed to specify the amount of indebtedness. Tney are set out *verbatim* supra.

SECOND PROPOSITION OF LAW HEREUNDER.

Where there is no jurisdiction over the person of

defendant, and the affidavit for attachment is fatally defective in wholly failing to state some fact prescribed by law as essential to its issuance, then the whole proceeding is *coram non judice* and void.

STATEMENT.

The summons was served by publication. The affidavit for attachment wholly failed to specify the amount of indebtedness claimed, as provided by the statute of Oregon.

AUTHORITIES.

Drake on Att. (7th Ed.) §89.

ARGUENDO.

Counsel for defendant relied in the Court below, and we suppose they will rely here, upon the case of Matthews vs. Densmore, 109 U. S. 216. But we think there is an essential difference in that case and the one at bar. There the defendant in the attachment suit was in court, and not having objected might well be held to have waived the defect. Here the defendant in attachment was not in court. The only jurisdiction the Court could have was over the *res*, and if the affidavit was defective and the writ void, there was no jurisdiction over the *res*, and the whole proceedings were void.

But even if we are wrong in the above contention we are certainly right in the following ones, and the Court should have sustained our objections thereon:

THIRD PROPOSITION OF LAW HEREUNDER.

The levy of a writ of attachment upon goods is void where the return shows that it was made simply by

posting a copy of the writ of attachment on the doors of the store house containing the goods.

STATEMENT.

The return of the marshal shows no other act under the writ, so far as the goods in controversy are concerned, other than the posting of a copy of the writ of attachment on the door of the store house containing the goods. [R. 15 and 18].

AUTHORITIES.

Scheider vs. Sears, 8 Pac. Rep. [Or.,] 843.

FOURTH PROPOSITION OF LAW HEREUNDER.

A levy of a writ of attachment upon personal property in the possession of one other than defendant in the writ, can only be made, under the laws of Oregon, [in force in Alaska] by giving notice of the levy, and delivering a copy of the writ to the person in possession of such property. If made in any other manner it is void.

STATEMENT.

The undisputed facts were that Marks, plaintiff in error, was in possession of the goods [R. 13]. Levy, the defendant in the writs, had left the country. [R. p. 4]. The defendant took the goods from plaintiff's possession by force and violence. (R. 13).

AUTHORITIES.

The statute of Oregon, in force in 1884, and extended to Alaska by act of congress, cited *supra* relating to levies reads as follows:

"The sheriff to whom the writ is directed and delivered shall execute the same without delay as follows: * * *

"2. Personal property, capable of manual delivery to the sheriff, and not in the possession of a third person, shall be attached by taking it into his custody.

"3. Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having the possession of the same." * * *

1 Hill's Code Or. (Ed. 1887) § 149, sub. 2 and 3,

Spaulding vs. Kennedy, 6 Or. 208.

Lewis vs. Birdsey. 26 Pac. Rep. (Or.) 623.

Bachellor vs. Richardson, 21 Pac. Rep. (Or.) 392.

Construing this statute, the Supreme Court of Oregon in the case of *Spaulding* vs. Kennedy, 6 Or. 208, decided in 1876, held that where an officer in making a levy of a writ, seized personal property in the hands of a third person, he was a trespasser, and cannot justify under the writ, even though the property belong to the defendant in the writ. When an officer armed with a writ, finds property which he supposes to belong to the defendant in the writ, in the hands of a third person, he has no right to determine the possession except in the manner provided by law. The same ruling is reaffirmed by the Supreme Court of Oregon in the two cases cited from the Pacific Reporter. See also Mickey vs. Stratton 5 Saw 475.

The Third and Fifth assignments of error will be considered together.

THIRD ASSIGNMENT OF ERROR.

"The Court erred in admitting in evidence to the " jury over plaintiff's objections the testimony of O. " H. Adsit, F. Y Schuck and O. J. Kendall, tending " to prove that in the months of April and May, 1898, " Joe Levy was largely indebted to the Powers Dry " Goods Company, the West Coast Grocery Co.. the " Willamette Tent & Awning Co. and others and was " wholly insolvent; and that he transferred the stock " of goods in controversy to one Levine without con- " sideration, and for the purpose of defrauding his " creditors. and Levine transferred the same stock to " O. J. Kendall. and Kendall transferred the same " stock to Antone Marks, all without consideration " and for the purpose of defrauding the creditors of " Joe Levy, and especially the Powers Dry Goods " Company and the West Coast Grocery Co." [R. " 29-30].

FIFTH ASSIGNMENT OF ERROR.

" The Court erred in giving the following instruc- " tions to the jury, towit:

" If you believe and find from the evidence that the " goods in controversy were transferred by Joe Levy " to one Levine without consideration, or for the pur- " pose of hindering, delaying and defrauding the " creditors of the said Joe Levy, and pursuant to the " same purpose, Levine transferred the goods to Ken- " dall, and pursuant to the same design, or with " knowledge or notice thereof Kendall transferred

" them to the plaintiff, Marks, you will find for the " defendant." (R. 30).

STATEMENT.

The bill of exceptions (R. 19 20) shows that when the evidence set out in the Third assignment was offered, plaintiff objected because the writs of attachment, and the levies thereunder, in the cases of the Powers Dry Goods Co. and the West Coast Grocery Co., being void, and there being no attachments and no personal service of summons in said cases the whole proceedings under which the marshal sought to justify were *coram non judice* and void, and the evidence offered was therefore immaterial and irrelevant. The objections were overruled and the testimony admitted and plaintiff saved his exception; and thereupon the Court gave the instructions set out in the Fifth Assignment of Error. (R. 20).

FIRST PROPOSITION OF LAW HEREUNDER.

Where an officer is sued by one person for seizure of goods under a writ against another under whom the plaintiff claims, the officer cannot raise the issue of fraud in the transfer to the plaintiff by the person named as defendant in the writ, unless he first shows a valid writ and a valid levy thereof on such goods; and unless he does so the question of fraud *vel non* is wholly immaterial.

AUTHORITIES.

Bump on Fraudulent Con. p. 453.

Bachellor vs. Richardson, 21 Pac. Rep. 392.

Lewis vs. Birdsey, 26 Pac. Rep. 623.

The issue of fraud should therefore have been entirely withdrawn from the jury.

But the charge contains another fatal error as will appear from a consideration of the

SECOND PROPOSITION OF LAW HEREUNDER.

The title of a vendee of a fraudulent vendee of goods can only be defeated by showing a participation in, or notice of the fraud on the part of the second vendee.

This rule is elementary.

Walker vs. Collins 1 C. C. A. 646. Hinds vs. Keith 6 C. C. A. 233.

The charge complained of authorized the jury to find for defendant, if Levy fraudulently sold to Levine, and Levine fraudulently sold to Kendall and if Kendall with a fraudulent design or knowledge or notice thereof transferred them to plaintiff Marks. In other words the jury could find for defendant though they might believe that plaintiff was an innocent purchaser for a valuable consideration, if they believed that the transfers from Levy to Levine, and from Levine to Kendall were fraudulent, and Kendall was actuated by a fraudulent motive in transferring to Marks, even though Marks did not participate in the fraud and had no notice of it. This charge is in accord with defendant's answer (R. p. 4) which only charged fraud against the transfers made by Levy, and nowhere connects plaintiff therewith; and the issue of fraud should have been withdrawn from the jury entirely.

Wise vs. Jeffries, 2 C. C. A. 43.

SIXTH ASSIGNMENT OF ERROR.

This assignment questions the correctness of the instructions given the jury by the Court wherein the Court charges that the jury must find for the defendant if they find and believe from the evidence, that Levy sold the goods in controversy to Levine, Levine to Kendall and Kendall to plaintiff Marks, and that in each of these first two transfers there was an agreement on the part of the vendee to assume an indebtedness of Levy to Marks as a part of the consideration, unless such agreement was in writing, as an oral agreement to that effect was void. See Record p. 20.

In giving this instruction the learned trial Court evidently had in mind that section of the statute of frauds declaring void an agreement to answer for the debt, etc , of another unless in writing. But a promise to pay the debt of another in consideration of property sold is not a promise to pay the debt of another. It is a promise to pay the promiser's own debt in a particular way. Clark on Contracts, pp. 98-99, and authorities there cited.

The effect of this instruction was the same as a peremptory charge to find for the defendant. Plaintiff might have won on the issue of fraud, notwithstanding the errors of the court. But there was no dispute but that the terms of the transfers as well as the transfers themselves under which plaintiff claimed the goods were all not in writing (see R. p. 14), and when the jury were told that if they found they were not in writing their "verdict must be for the defendant," there was no need for the jury to pass upon any other question.

FOURTH ASSIGNMENT OF ERROR.

This assignment (Record p. 30) complains of the action of the court in refusing the motion of the plaintiff at the conclusion of the whole testimony to give a peremptory instruction for plaintiff (R. p. 20). The grounds of the motion were in effect that the plaintiff's possession and title of the goods were admitted except as met and avoided by the plea of justification; and that plea having failed, for want of valid writs and valid levies, plaintiff was entitled to judgment.

In view of the authorities cited under the preceding assignments we submit the motion should have been granted.

In conclusion we submit that the judgment of the lower court must be reversed

1st. Because of error in the ruling of the court in admitting in evidence the judgment rolls in the cases of Powers Dry Goods Co. and the West Coast Grocery Co vs. Levy.

2d. For error of the court in admitting in evidence to the jury the testimony of Adsit, Schuck and Kendall tending to show fraud in the several transfers through which plaintiff obtained his title and possession of the goods in controversy.

3d. For error of the court in the instructions to the jury on the issue of fraudulent transfers.

4th. For error of the court in instructing the jury to find for defendant if in the transfers from Levy to Levine and from Levine to Kendall, the vendees as a part of the consideration for the goods assumed to pay

a debt of Levy to Marks, unless such assumption was in writing;

And the cause remanded to the U. S. District Court in and for the District of Alaska with instructions to grant a new trial.

W. W. Dudley
L. J. Michener

W. E. CREWS,

J. H. COBB,

Attys. for Antone Marks,

Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1899.

ANTONE MARKS,
Plaintiff in Error

vs.

J. M. SHOUP,
Defendant in Error

NO. 328

Error to the District Court in and for the District of Alaska.

BRIEF OF DEFENDANT IN ERROR.

S. M. STOCKSLAGER AND
GEORGE C. HEARD,
Attorneys for Defendant in Error.
ARTHUR K. DELANEY,
of Counsel.

STATEMENT OF CASE BY DEFENDANT IN ERROR.

Defendant in Error submits the following statement of the case, controverting the statement of the Plain-

tiff in Error, so far as the same is conflicting or inconsistent herewith. As disclosed by the pleadings and evidence the case is as follows:

1. On the 1st day of May, 1898, one Joe Levy was engaged in the mercantile business at Juneau, Alaska, and was then and there the owner and in possession of a certain stock of goods, contained in a certain store building on Seward street, the value of which stock of goods was about three thousand dollars ($3,000), and which was the sole and only property of said Levy in Alaska. (Transcript, pp. 3 and 4, 13–19.)

2. That said Levy was at that time largely indebted and practically insolvent, and a day or two afterwards attempted to transfer said stock of goods to Plaintiff in Error, and then absconded, for Japan, concealing himself aboard a steamer southward bound from Juneau, for that purpose. (Transcript, pp. 4–19.)

3. That said transfer was made with the intent to hinder, delay and defraud the creditors of said Levy, among whom were the Powers Dry Goods Co. of St. Paul, Minnesota, and the West Coast Grocery of Tacoma, Washington. (Transcript, idem.)

4. That for the purpose of collecting their claims, said companies brought their several actions against said Levy in the U. S. District Court of Alaska, a few days after he had absconded, and also caused writs of attachment to issue out of said Court, which were placed in the hands of the Defendant herein, then the U. S. Marshal for Alaska, for service, who under and by virtue of such writs, on or about the 16th day of May, A. D. 1898, duly levied upon the said stock of goods situated in said store building as the property of said Levy, and for the purpose of securing the payment of the said claims of the said companies. (Tran-

script, pp. 4, 5 and 15, 16, 18 and 19.) Service of summons in each case was had by publication. (Transcript, pp. 16 and 18.)

5. That afterwards, on the 5th day of October, A. D. 1898, said claims were severally merged into judgments, which still remain final adjudications of the said District Court, and on the same day executions were severally issued on said judgments, the said stock of goods levied upon and sold and such executions returned on the 24th day of October, 1898, satisfied in full. (Transcript, pp. 8–15, 16, 17, 18, 19.)

6. This action was brought in the Court below by Marks, the fraudulent vendee and Plaintiff in Error against Defendant in Error as Marshal, alone, for the value of the goods, and damages for levy and seizure thereof, and was tried by jury on the 3d day of December, 1898, upon the issues substantially stated above, which trial resulted in a verdict for Defendant in Error, which after motion for new trial, overruled, went to judgment on the 9th day of January, 1899. (Transcript, pp. 1–13 inclusive.)

This writ of error is brought from that judgment.

ARGUMENT.

1. The validity of the writs of attachment and levies thereunder.

The first five assignments of error hinge upon this proposition, and as all the questions raised have been repeatedly adjudicated by this Court, a mere citation of authorities will suffice.

Voorhees vs. Bank of U. S., 10 Peters 499; Book 9, L. C. P. Co's Ed., p. 490, foot paging.

Grignon et als vs. Astor et als., 2 Howard 319; Book 11, L. C. P. Co's Ed., p. 283, foot paging.

Cooper vs. Reynolds, 10 Wall 308; Book 19, L. C. P. Co's Ed., p. 931, foot paging.

Mathews vs. Densmore, 109 U. S. 206; Book 27 L. C. P. Co's Ed., p. 912, foot paging.

Kempe vs. Kennedy, 5 Cranch, 173; Book 3, L. C. P, Co's Ed., p. 70, foot paging.

Thompson vs. Tolmie, 10 Peters 449; Book 7 L. C. P. Co's Ed., p. 381, foot paging.

A consideration of the foregoing leads irresistably to the following conclusions:

(a) That the writs of attachment were valid and afforded a perfect protection to the Marshal, Defendant in Error, herein.

(b) That the levy upon and seizure of the goods, by the Marshal, thereunder, vested the Court with jurisdiction.

(c) That where jurisdiction appears, the proceedings of the Court cannot be collaterally attacked nor its errors or mistakes, if any, corrected, or examined, when brought up collaterally.

2. The question of fraud.

Fraud is confessed by the record. (Transcript, p. 19.) It is therefore not necessary to advert to the earmarks, which are so numerous and self-evident in the testimony on this question.

We call attention to consequences only; among which the following propositions are incontrovertable:

(a) The transfers from Levy through Levine and Kendall to Plaintiff in Error are void.

(b) And where this is the case the rights of creditors are the same as if the conveyances had never been made.

Statute of Oregon, Deady's Code, Sec. 51, p. 523.
Hill's Code, Vol. 2, Sec. 3059, p. 1373.

Out of the legion of authorities by the courts of last resort throughout the United States, construing this statute, we cite the following by the Supreme Court of Oregon.

Page et al. vs. Grant, 9 Oregon, 116–120.
Crawford vs. Beard, 12 idem 447, 8 Pac. 537.
Philbrick vs. O'Connor, 15 idem 15, 13 Pac. 612
Lyons vs. Leahy, 15 idem 8, 13 Pac. 643,

For discussion of the general questions involved, see

Patrick vs. Smith, 2 Pa. Super. Court 113.
Thomson et al. vs. Crane et al., 73 Fed. 327.
Dorrance vs. McAlester, 91 Fed. 614.
Sonnetheil vs. Brewing Co., 172 U S. 401.

3. The statute of frauds.

Under the testimony of the Plaintiff in Error, which is uncontradicted, the contracts of sale are clearly within this statute. (Transcript, p. 14.)

Hill's Code, Vol. 2, p. 1373.

Among the multitude of authorities construing this statute, we cite as especially in point,

Newman vs. Newman, 7 Kan. App. 77, 52 Pac. 908.

In any event the contract of loan between Plaintiff in Error and Levy is void for usury, as Plaintiff in Error exacted only the modest sum of five per cent. per month or sixty per cent. per annum interest; and his testimony as to this is also uncontradicted. (Transcript, p. 14.)

This contract is in violation of the statute.

2. Hill's Code, pp. 1559 and 1660.

And contract is void.

In re Pittock, 2 Sawyer 416; U. S. vs. 372 Pipes Spirits, 5 idem 421.

Bank of U. S. vs. Owens, 2 Peters U. S. 536; Book 7, L. C. P. Co's Ed., p. 508, bottom paging.

Obviously, Plaintiff in Error cannot recover on this contract and has no standing in Court under it. Hence the instruction complained of in the sixth Assignment of Errors (Transcript, p. 30), if erroneous, is harmlessly so.

The judgment of the Court below, therefore, should be affirmed.

S. M. STOCKSLAGER,
GEORGE C. HEARD,
Attorneys for Defendant in Error.

ARTHUR K. DELANEY, of Counsel.

Supreme Court of the United States.

No. 82.—October Term, 1900.

Antone Marks, Plaintiff in Error, vs. J. M. Shoup. } In error to the District Court of the United States for the District of Alaska.

[May 13, 1901.]

Mr. Justice McKenna delivered the opinion of the Court.

This is an action for damages, brought by the plaintiff in error, who was also plaintiff in the court below, and we will therefore so designate him, against the defendant, by virtue of his office, caused by the taking from the possession of the plaintiff of a certain stock of goods, wares and merchandise.

The goods originally belonged to one Joe Levy, who sold them to one Levine by verbal sale, and as a part of the consideration Levine assumed to pay a debt due to the plaintiff. Levine sold them to one Kendall, who assumed to pay the same debt. Kendall sold and delivered them to plaintiff.

The defendant was at the time of the taking of the goods marshal of Alaska, and he justified the taking under and by virtue of attachments issued out of the District Court against Levy, one in the case of *Powers Dry Goods Co.* v. *Levy*, and the other in the *West Coast Grocery Co.* v. *Levy*, and claimed that the transfers by Levy were in fraud of his creditors.

The plaintiff replied that he had bought the goods from third persons for a valuable consideration, denied all fraud, and further pleaded that during all the time from prior to the commencement of the actions mentioned in defendant's answer until and at the time of the taking, he was in the actual and exclusive possession of the goods, and denied that defendant ever made any levy whatever upon said goods.

Defendant filed a supplemental answer at the trial setting up that the attachments had merged in judgments upon which executions had issued, the goods sold and the judgments satisfied.

The case was tried before a jury, and resulted in a verdict for the defendant.

Motion for a new trial was made and overruled, and judgment entered for defendant. This writ of error was then sued out.

In the attachment suits against Levy summons was issued but not served, and substituted service was afterward obtained by publication. The affidavits for the attachments did not mention the amount of indebtedness

claimed, and the sufficiency of the substituted service and the validity of the judgment based upon it are attacked on that ground.

It is also contended that the levies of the attachments were invalid; and error is assigned on the admission of the testimony and in giving instructions to the jury.

(1) The laws of Oregon were in force in Alaska at the time of the attachments. (23 Stat. 24.) The provision for attachments was as follows:

"A writ of attachment shall be issued by the clerk of the court in which the action is pending, whenever the plaintiff or any one in his behalf shall make an affidavit showing:

"1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counterclaims) upon a contract." (1 Hill's Code, Oregon, ed. 1887, § 145.)

It is contended that these provisions were not complied with and the attachments were therefore void, and, they being void, there was no foundation for the judgments. This court has ruled already as to that contention in the case of *Matthews* v. *Densmore*, (109 U. S. 216,) and other cases. In *Matthews* v. *Densmore*, the claim of a defect in the affidavit invalidating the attachment was directly passed on, and of the attachment it was said:

"It may be voidable. It may be avoided by proper proceedings in that court. But when in the hands of the officer who is bound to obey it, with the seal of the court and everything else on its face to give it validity, if he did obey it, and is guilty of no error in this act of obedience, it must stand as his sufficient protection for that act in all other courts."

(2) The answer of the defendant alleged that the writs of attachment in the actions mentioned were placed in his hands for service, and by virtue of them he "duly levied upon all of the goods, wares and merchandise set forth in plaintiff's complaint herein, and ever since that time has held and now holds the same as said United States marshal under and by virtue of said writs."

His returns upon the writs were as follows:

"I hereby certify that I have executed the within writ of attachment by levying upon the personal property of the within-named defendant, to wit: All the goods, wares and merchandise situated in the one-story building one door door south of B. M. Behrends' bank, on Seward street between Second and Third streets, in the town of Juneau, District of Alaska, by posting a copy of said writ of attachment on the front door of said building; also, eleven (11)) cases of boots and shoes consigned to the within-named defendant, Joseph Levy, situated in the warehouses of the Pacific Coast Steamship Company, by delivering a notice and copy of the within writ of attachment on H. F. Robinson, the agent of said Pacific Coast Steamship Company, and have all of the above-described personal property of the above-named defendant now in my possession.

"Dated at Juneau, Alaska, May 14, 1898."

It will be observed that the returns are somewhat vague as to whose possession the property was in at the time of levy. If the fact can be said to have been put in issue by the pleadings the only evidence in the case was given by the plaintiff as follows:

"About the 10th day of May, 1898, I was the owner and in the possession of a stock of goods, wares and merchandise in Juneau, Alaska. The goods were in the building on Seward street, next to B. M. Behrends. On or about that date the United States deputy marshal, W. D. Grant, came to the store and took the goods out of my possession. I declined to surrender possession, but the deputy marshal forcibly put me out of the building, took the key out of my pocket, and locked the front door."

The truth of this was not questioned, and it must be accepted as established that at the time of the levy the property was in the possession of the plaintiff. What is the effect of it? In other words, was the levy made, as described in the return of the defendant, legal?

The statute provided as follows:

"The sheriff to whom the writ is directed and delivered shall execute the same without delay as follows: . . .

"2. Personal property, capable of manual delivery to the sheriff, and not in the possession of a third person, shall be attached by taking it into his custody.

"3. Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having the possession of the same." (1 Hill's Code Or. ed. 1887, § 149, sub. 2 and 3.)

These provisions were passed upon in *Spaulding* v. *Kennedy*, (6 Oregon, 208.) The facts of the case as stated by the court were as follows:

"Litchenthaler and Simpson were, on the ninth of November, 1875, the owners of a certain mare, the property in dispute, upon which they executed a chattel mortgage of that date in favor of the Granger Market Company. This mortgage was duly recorded, and remained unsatisfied at the commencement of this action. Subsequently Litchenthaler and Simpson delivered the mare to the plaintiff upon a second chattel mortgage by them in his favor, executed subsequently to the one in favor of the Granger Market Company.

"In March, 1876, one James Welch obtained a judgment against the Granger Market Company, upon which an execution was issued, and placed in the hands of Kennedy, the appellant, who was a constable. Kennedy under this execution levied, as it is claimed, upon the mare, as the property of the Granger Market Company, by taking her from the possession of one Stemme, the bailee of the plaintiff Spaulding. Spaulding brought this action to recover possession."

The court said:

"It was the object of the levy to subject the right of the Granger Market Company to execution, and in order to do so, and by a levy and sale, transfer this right to an execution purchaser, the officer must pursue the course pointed out by the statute."

And after quoting the statute, said further:

"This property not being in the possession of the Granger Market Company at the time of the levy, the officer could not, by virtue of his writ, lawfully take it from the possession of a third person in whose possession he found it, and he committed a trespass in so doing. It is claimed that this statute is simply intended to protect those in possession of property who may have a lien on it by virtue of which they may be entitled to redeem it. This may be the object of the statute. The statute provides that such persons, when summoned as garnishees, shall answer and show by what title they hold the property; but the sheriff, when he finds the property which he supposes belongs to the judgment debtor in the possession of third persons, has no right to determine the right of that possession, except in the manner provided by law."

The same principle was expressed in *Lewis* v. *Birdsley*, (26 Pac. Rep. 632,) and in *Bachellor* v. *Richardson*, (21 Pac. Rep. 392.)

The cases cited by defendant in error are not to the contrary. *Page et al.* v. *Grant*, (9 Oregon, 116,) was a direct attack, after execution returned unsatisfied, upon a sale claimed to be fraudulent. *Lyon* v. *Leahy*, (15 Oregon, 8,) and *Philbrick* v. *O'Connor*, (15 Id. 15,) and *Crawford* v. *Beard*, (12 Id. 447,) were creditor's bills brought to set aside deeds for real estate after return of execution unsatisfied. It follows that the levy was invalid and could constitute no defense to the defendant, and the jury should have been so instructed.

(2) The error assigned on instructions not disposed of by the above reasoning it is not necessary to consider. We may say, however, that we have grave doubts of their correctness.

Judgment reversed with costs and cause remanded with directions to grant a new trial.

True copy.

Test:

Clerk Supreme Court, U. S.